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Supreme Court

of the

United States

OCTOBER TERM, 1979

No. 79-230

JOHN KLEINSCHMIDT AND
MICHAEL SORRENTINO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 4, 1979.

CITATIONS TO OPINIONS BELOW

The judgments of the District Court are unreported. The opinion of the United States Court of Appeals for the Fifth Circuit, upon direct appeal to that Court, appears in the appendix hereto (A. 9-17), and is presently unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1979. (A. 9-17). Rehearing and Suggestion for Rehearing En Banc were denied on July 13, 1979 (A. 18). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. WHETHER OFFICERS OF THE UNITED STATES CUSTOMS SERVICE MAY BOARD AND THEREAFTER SEARCH PRIVATE CRAFT IN CUSTOMS WATERS UPON MERE SUSPICION OF CRIMINAL ACTIVITY?

2. WHETHER SEARCH OF THE SUBJECT VESSEL'S CABIN MAY BE JUSTIFIED AS A PROTECTIVE SEARCH FOR WEAPONS, WHERE THE SEARCHING OFFICER WAS UNABLE TO ARTICULATE ANY FACTS SUGGESTING REASONABLE APPREHENSION OF HARM TO THE OFFICER?

STATUTE INVOLVED

The statutory provision involved is 19 U.S.C. §1581(a). It is printed in the appendix hereto (A. 19).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourth Amendment to the Constitution of the United States, which states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

The Petitioners, were charged by indictment in a single count alleging possession with intent to distribute a quantity of marijuana in violation of Title 21 USC §841(a)(1) and Title 18 USC §2. (Vol. 1, R. 1). Prior to trial an evidentiary hearing was held before a United States Magistrate on the Petitioners' application for suppression of the evidence seized. (Vol. 2, R. 3-90). The Magistrate recommended denial of the motion and appeal therefrom to the District Court was affirmed, the Motion to Suppress then being denied. (Vol. 3, R. 37-38).

At hearing on the Petitioners' Motions to Suppress, the following facts were developed. Clark Settles, a Supervisory Customs Patrol Officer, testified for the Government. He stated that on the night of December 20, 1977, at approximately 11:30, he was on duty in Port Everglades Cut, serving as Captain of a 26 foot customs patrol vessel. (Vol. 2, R. 6-7). Two other officers, Richter and Collins, were also on board. At that time, a radio message was received from C.P.O. Glenn Stuart, stationed in an observation tower, that "the vessel" was entering Port Everglades Cut, and that it "looked good". (Vol. 2, R. 8). The direction of the vessel's travel was east to west.

On cross examination pertaining to the foregoing, the witness added that the vessel was otherwise unidentified. There was no information supplied that the vessel had met any other vessel at sea, or that it had visited any ports outside the United States. (Vol. 2, R. 21). Although not part of the radio transmission, Stewart subsequently told the witness that he had first seen the lights of the vessel one mile off shore. (Vol. 2, R. 20).

Settles' function that evening was, as part of an "operation" to "detect vessels coming from offshore and to narrow down the vessels that we stopped or went by and checked." (Vol. 2, R. 7). This was stated to be an ongoing operation, one of the factors considered by Settles in the performance of this duty being his opinion that the month of December was an "historically heavy smuggling period of time". (Vol. 2, R. 7).

At Settles' first sighting the subject vessel was heading from east to west in the Cut. In his opinion the vessel was handling "sloppily" or "wallowing" (Vol. 2,

R. 9), although he subsequently admitted that he had seen other boats handle strangely in those waters, and it indicated either a problem with the vessel or a loaded boat. (Vol. 2, R. 36). The cabin was observed to be dark and a canvas cover was installed over the windshield. The individuals were on the flying bridge. (Vol. 2, R. 9). The vessel displayed a proper set of running lights. (Vol. 2, R. 38).

Settles at first testified that the waterline appeared improperly marked. (Vol. 2, R. 9). On cross examination he qualified his answer that the waterline did in fact appear ". . . where it should have been or higher". The waterline only appeared "strange" to Settles ". . . from the fact that the boat was handling strangely . . ." (Vol. 2, R. 37).

Settles did not stop the subject vessel at their first passing when separated by a distance of approximately twenty feet. It was after passing and observing the subject's name, "Business Stinks" a name which was furnished on a list of suspected vessels by the local municipal police department, that the customs vessel turned and followed. (Vol. 2, R. 10, 13).

The information then known to Settles was that approximately two weeks before the evening of December 30, he had been told by another Customs Officer, Dick Boyer, that the Ft. Lauderdale Police suspected the subject vessel was one of several that were carrying foreign contraband. (Vol. 2, R. 12-13). Neither Boyer nor Settles knew the basis for this information from the Ft. Lauderdale Police. (Vol. 2, R. 24). None of the information had been developed by Boyer himself, and it was only assumed by the witness that the list of suspected

vessels, upon which the subject vessel appeared, had been assembled by a policeman within the local municipal police force. (Vol. 2, R. 25).

Braced with this wholly unsubstantiated, non-specific, two week old tip the customs officers, upon recognizing the name of the "Business Stinks" came up behind the subject vessel, turned on their "blue light" and called out to the individuals aboard to stop their boat, which they did. When Settles received no reply to his also shouted inquiries of their trip's origin and whether their registration papers were aboard, the officers boarded the subject vessel. (Vol. 2, R. 13, 14). Settles headed for the flying bridge to inspect the boat's papers.

Officer Collins testified that while Settles was heading for the crew on the flying bridge, he went directly to the main cabin and opened the door to look inside. His testimony that he smelled "what could be marijuana," and saw bales of "possibly marijuana" inside the cabin after he opened the door. (Vol. 2, R. 74). He first smelled the aroma when approximately one foot from the cabin door. (Vol. 2, R. 84). After the door was opened the officers saw bales in piles, inside the cabin.

Samples of the substance were introduced over objection that it had been seized in violation of Petitioners' Fourth Amendment rights. (Vol. 3, R. 5).

Both the Magistrate and the District Court in accepting the Magistrate's Report and Recommendation relied entirely upon the border search doctrine to validate the Customs Officers' actions. On direct appeal the Fifth Circuit expressly declined to justify the subject

search under the lessened Fourth Amendment strictures applicable to border searches, contrary to the major premise of both the Magistrate and the District Court.

REASONS FOR GRANTING THE WRIT

I

OFFICERS OF THE UNITED STATES CUSTOMS SERVICE MAY NOT BOARD AND THEREAFTER SEARCH PRIVATE CRAFT IN CUSTOMS WATER UPON MERE SUSPICION OF CRIMINAL ACTIVITY.

Searches of vessels at sea and in coastal waters have historically been conducted by such agencies as the Customs Service and the Coast Guard. The boarding of such vessels and their attendant inspections and searches have generally fallen into three categories: (1) Customs searches; (2) Administrative inspections to enforce marine safety regulations; (3) Searches founded on probable cause or articulate facts giving rise to reasonable suspicion of a violation of law.

In the present case, the government contended that the justification for its stopping, boarding, and searching of the subject vessel was its classification as a customs search under Title 18 U.S.C. §1581(a) conducted at the functional equivalent of the border. The District Court agreed and held that the Customs officers' actions were proper in the context of the border search doctrine. Upon direct appeal to the Court of Ap-

peals below, it was held that there was an insufficient nexus with the border to qualify as a border search; nonetheless the Court upheld the boarding and search upon alternative grounds. The decision of the Court of Appeals on such grounds directly conflicts with decisions of the Ninth Circuit in an area of significant concern under the Fourth Amendment.

Citizens who elect to travel upon the coastal waters of this country do not thereby suffer a diminished expectation of privacy, a concept which both Courts below, although by different means, have seemed eager to embrace. See *Katz v. United States*, 389 U.S. 347 (1967). The Ninth Circuit, in the context of customs searches has repeatedly recognized that citizens have an expectation of privacy protecting them against warrantless searches which do not qualify as border searches. *United States v. Tolmes*, 527 F2d 1370 (9th Cir 1975); *United States v. Tilton*, 534 F2d 1363 (9th Cir 1976); *United States v. Stanley*, 545 F2d 661 (9th Cir 1976).

Notwithstanding, a series of decisions by the Fifth Circuit Court of Appeals appears to have treated boardings for safety or document inspections as being beyond the purview of the Fourth Amendment. *United States v. Odom*, 526 F2d 339 (5th Cir 1976); *United States v. Hillstrom*, 533 F2d 209 (5th Cir 1976); *United States v. Norren*, 550 F2d 219 (5th Cir 1977), Cert. den. 434 U.S. 1016. Although the decision below, as its alternative basis for affirmance, finds probable cause from the juxtaposition of other facts of record, it is submitted that such finding upon the facts of this case contravenes the express decisions of this Court as well as those of other Courts of Appeals.

The detention and boarding of the subject vessel constituted an intrusion sufficient to invoke Fourth Amendment principles. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). While the Customs Service has statutory authority to board under 19 U.S.C. §1581(a), the existence of such statutory authority does not immunize a search against Fourth Amendment scrutiny. *Almeida & Sanchez v. United States*, 413 U.S. 266, 272 (1973); *United States v. Bowen*, 500 Fed 960 (9th Cir 1974), aff'd 422 U.S. 916 (1975). Thus, any warrantless on board inspection remains subject to scrutiny respecting its reasonableness considering: (1) The degree of intrusion relative to the purpose served, and (2) The scope of the search effected by the officer in accomplishing that purpose. *Terry v. Ohio*, 392 U.S. 1 (1968).

The balance is one between the public purpose to be served and the individual's constitutionally assured expectation of privacy.

> "In order to assess the reasonableness of (the officer's) conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justified official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.' " *Terry v. Ohio*, 392 U.S. 1, 20-21.

The public purpose in the case at bar was the Customs Officers' interest in boarding and inspecting the subject vessel's documentation. Officer Settles' con-

duct on board comported with just such interest. He proceeded directly to the crew on the flying bridge.

By contrast, Officer Collins immediately commenced the broadest of searches, proceeding to an unoccupied part of the vessel and commencing a search of the cabin. His attested apprehension of the odor of marijuana as he approached the cabin door cannot be accepted under the plain view doctrine, as indicated by the Court below. Collins' expressed intent and entire course of action on the vessel from the moment he boarded was to conduct the broadest of searches. His venture into a different part of the vessel exceeded in scope the only purpose of the officers in boarding, the inspection of documents, which purpose Settles was effecting in his approach of the crew on the bridge. The sole other justification for his actions, that of a self-protective search, is addressed in the following point.

II

THE SEARCH OF THE SUBJECT VESSEL'S CABIN CANNOT BE JUSTIFIED AS A PROTECTIVE SEARCH FOR WEAPONS, WHERE THE SEARCHING OFFICER WAS UNABLE TO ARTICULATE ANY FACTS SUGGESTING REASONABLE APPREHENSION OF HARM TO THE OFFICER.

In the instant case it is undisputed that at the time of boarding neither of the two customs agents had probable cause to believe that the subject vessel or its crew either was then or had been involved in criminal

activity. Having through their observations gained nothing more substantial than mere suspicion, the agents' actions in their stop and boarding of the vessel should necessarily have been circumscribed within limits dictated by reasonableness of the intrusion in relation to the object of the officers' boarding.

Indeed in the instant case the lead officer, Agent Settles, boarded with the intent of inspecting the vessel's registration papers, and his conduct on board was reasonably limited in that regard; he proceeded directly to the crew visible on the flying bridge.

The decision of the Court of Appeals below was, however, based entirely upon the actions of Officer Collins.[1] Collins testified that while Settles was heading for the crew on the flying bridge, he went directly to the main cabin and opened the door to look inside. His stated intention in opening the door was to search for contraband and to protect himself against any persons inside.

The decision of the Court below in seeking an alternative basis for affirmance, after rejecting applicability

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[1]The factual recitation in the Court of Appeals' opinion that "both officers" testified to an odor of marijuana is incorrect and fundamentally misleading. Collins, who went directly for the cabin door, smelled "what could be marijuana". Officer Settles smelled nothing until after Collins had already invaded the cabin. Clearly, such testimony by Settles cannot be deemed evidence contributory to a finding of probable cause unless the fruits of the search be accepted as cause for its commission. The facts then known to Collins did not warrant such intrusion, just as the scope of the intrusion could not be deemed reasonably related to the circumstances which first justified the governmental interference. *Terry v. Ohio*, supra.

of the border search doctrine, directly contravenes the principles set forth by this Court in *Terry v. Ohio*, supra, and *Sibron v. New York*, 392 U.S. 40 (1968). Officer Collins' chief justification for opening the cabin door was his professed concern for self-protection. He offered no facts to suggest the presence of weapons on either the persons of crew or on the boat itself.

In *Terry*, supra, this Court held that a lawful search incident to an investigatory encounter must meet three criteria: (1) The officer must have reasonable grounds for approaching and detaining the subject; (2) The circumstances must warrant a belief that the subject is armed and dangerous; and (3) The search must be limited in scope to the discovery of readily accessible weapons.

Under the Court's established standards, the intrusion into the cabin was wholly unjustifiable from the facts of record. Its most rational explanation is rather that of a pretext to conduct the search for contraband which was Officer Collins' announced intent from first approach to the vessel, even prior to boarding:

Q. What did you board the vessel for?

A. For documentation check.

Q. Anything else?

A. Because the vessel had been on lookout.

Q. And to look for marijuana?

A. Certainly, sir.

Q. That was the first thing that you did when you went on board, went to the cabin — not only a security check but to see if any marijuana wasn't in the cabin?

A. Not only that. To see if there was anybody else inside.

Q. And to see if there was marijuana in the cabin?

A. Yes, sir.

Q. You didn't even ask for permission from the men on the bridge if you could examine the boat, did you?

A. No, sir, I didn't.

[Vol. 2 R. 80]

[Vol. 2 R. 80]

"In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, supra at 21. Again, in *Sibron v. New York*, supra, the Court reiterated, "Before he places a hand on the person of a citizen in search of anything, he must have constitutionality adequate, reasonable grounds for doing so. In the case of the self protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." It is precisely such facts which were entirely omitted from proof of the instant cause in the trial court.

In *Terry* this Court held that the need for such articulable facts was mandated by the requirement of judgment of such conduct against an objective standard, because the feelings or hunches of an officer are too lacking in substance to effectively guarantee protection of constitutional rights. 392 U.S. at 21.

The "objective evidentiary justification which the Constitution requires" (392 U.S. at 15) was entirely omitted in the analysis of the Court below. Instead, the Fifth Circuit in its opinion below acquiesced in Collins' assertion of ubiquitous, omnipresent fear as a foundation for a legal inference of risk of danger, cf. *United States v. Collins*, 439 F2d 610, 617 (DC Cir 1971). To do so is to entertain the conversion of the aforesaid decision of this court to a doctrine which will easily condone sham or pretextual searches.

Officer Collins' action in throwing open the cabin door was as offensive as Patrolman Martin's thrusting of his hand into Sibron's pocket. As in the present case, the contraband there was narcotics.

> "Before he places a hand on the person of a citizen in search of anything he must have grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. *Terry v. Ohio*, supra. Patrolman Martin's testimony reveals no such facts . . . Even assuming arguedo that there were adequate grounds to search Sibron for weapons, the nature and scope of the search conducted by Patrolman Martin was so clearly unrelated to that justification as to render the heroin inadmissible.
>
> . . . His testimony shows that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception — the potentially dangerous man Such a search violated the guarantee of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrustions on the part of all government agents." Id. at 64-66.

In the instant case no less intrusive alternative was even considered by Collins. Collins, like Martin, was looking for narcotics, and found them. Obviously, any danger from the cabin could have been adequately controlled by the third crewman who had remained on the adjacent patrol boat, without resort to a full search of the cabin.

Officer Collins searched the cabin not because he had an articulable basis to fear an armed and dangerous crewman, but merely because he had boarded the vessel. The strict requirements of *Terry* and *Sibron* mandate that police who take extraordinary measures must bear the burden of justifying them. The Fifth Circuit's decision below contravenes this mandate.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari were mailed to Linda Hertz, Esquire, Assistant U.S. Attorney, 300 Ainsley Building, Miami, Florida, this day of August, 1979.

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WILLIAM L. ROGERS

Appendix

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-6003-Cr-SMA

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

MICHAEL SORRENTINO,
Defendant.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE ON MOTION TO SUPPRESS

This cause came on to be heard before the undersigned upon the Motion of Defendant, MICHAEL SORRENTINO, to Suppress the Evidence, to-wit: marijuana, seized on or about December 30, 1977 from the vessel "Business Stinks" by United States Customs Officers.

An Evidentiary Hearing was held on April 6, 1978.

The undersigned makes the following findings of fact:

1. On December 30, 1977 at approximately 11:30 p.m., a radio message was received by Customs Patrol Officer Clark Settles, a man of seven years experience,

from Customs Patrol Officer Glenn Stuart who was lookout at the Naval observation tower off the Dania Beach South Jetty to the effect that a vessel which had been under observation a mile off-shore traveling from East to West, was proceeding into Port Everglades cut and it "looked good". This was a period of time when smuggling was historically heavy. (T 7)

2. C.P.O. Settles, a Customs Patrol officer for seven years, was on board a 26 foot Customs Patrol Boat in Harbor West off the Intercoastal Waterway and proceeded towards the sighted vessel. As the vessel was being approached C.P.O. Settles observed that it was handling sloppily and wallowing as if it had a heavy load (T 9, 38) but that, nevertheless, the water line appeared to be either correct or maybe too high for the boat which indicated there was possibly a false waterline or a load of some type on the vessel (T 9, 39). To Officer Settles, something was wrong and he was suspicious.

Upon approaching the vessel closer, it was observed that the name of the vessel was "Business Stinks", that there were two (2) men on the flying bridge; that the cabin was dark and that there was a canvas covering over the front windshield of the vessel. (Subsequent examination proved that the waterline was extremely high [T 10].)

Customs Patrol Officer Settles noted that the vessel "Business Stinks", with its description, was one of several vessels being watched by the Fort Lauderdale Police Department going out of the country and indicated it would pick up contraband (T 13).

This information he had received from Customs Officer Boyer two weeks before (T 42), and he further ascertained that during the three hour period of duty of Officer Stuart in the observation tower, this vessel had not been one of those observed leaving port.

Officer Settles had the Blue Light of the Customs Patrol boat turned on; the Patrol Boat came within twenty (20) feet of the "Business Stinks", identified itself as United States Customs, called to the "Business Stinks" to halt, and asked the men on board the "Business Stinks" where it was coming from and whether they had any registration papers for the vessel. Neither question was responded to. (T 14)

The "Business Stinks" was then boarded by Officers Settles and Collins.

Officer Collins, who had been a Customs Patrol Officer for three (3) years, went to the cabin to secure the vessel and to protect himself from any danger that might lurk therein, opened the door of the cabin, smelled marijuana and found the cabin filled with bales of marijuana. Officer Collins also testified that the "Business Stinks" was handling hard and "not as it should be".

Quite a few other vessels had come through Port Everglades Cut that evening, but only one other had been stopped. (T 18)

The halting and boarding of the "Business Stinks" was not an arbitrary stopping by officers based upon unsupported intuition. *United States v. Mallides,* 473 F.2d 859 (9th Cir. 1973). It was based upon:

(1) The vessel came from off-shore.

(2) The date the vessel was observed, to-wit: December 30, 1977, was during a period of historically heavy smuggling.

(3) When the vessel was closer observed, it was noted to be wallowing as if carrying a heavy load and yet its waterline was not below the water — a condition hard to explain and one to cause suspicion to two Customs Patrol Officers, one of seven years and the other of three years experience.

(4) The cabin was dark (although the vessel did have proper running lights) and there was a canvas covering the front windshield.

(5) The vessel "Business Stinks" was on a list furnished by the Fort Lauderdale Police Department as being suspected of engaging in contraband.

(6) The vessel was a 32 foot Trojan capable of going foreign. (T 20)

(7) While quite a few other vessels came through Port Everglades Cut the night of December 30, 1977, only one other vessel besides "Business Stinks" was stopped by Customs Patrol.

(8) The occupants of the vessel did not respond to enquiries by the Customs Patrol Officer as to where it was from and for its registration papers.

All of the above facts are sufficient in the opinion of the undersigned to constitute such reasonable suspicion

as to authorize the boarding of the vessel "Business Stinks" and the border search thereof.

While some of the above facts standing alone might not be sufficient to constitute "reasonable suspicion", nevertheless, the combination of all together are the specific articulable facts, together with rational inferences from these facts, that reasonably warrant suspicion. See *United States v. Brignoni-Ponce,* 422 U.S. 873 at 884, 95 S.Ct. 2574 at 2582, 45 L.Ed. 607 (1975), which held that based on the *insufficient* facts submitted to it, reasonable suspicion was lacking. See also, *Arch v. United States,* 13 F.2d 382, (5th Cir. 1926).

C.P.O. Settles acted on intuition and on what he felt was reasonable suspicion, all based on experience of handling 50 cases. (T 68) It was a combination of intuition and "logical fact, things that are wrong, things that are incongruous, that are not as they should be". (T 70) C.P.O. Collins opened the door of the cabin having smelled marijuana to see if marijuana was there but his primary purpose was to see if anyone else was inside — "self-preservation". (T 85)

In *United States v. Solmes,* 527 F.2d 1370 (9th Cir. 1976), the Court upheld a search of a vessel in a bay adjacent to the ocean, as being a border search made at the functional equivalent of the border and one which did not need probable cause for its propriety. While the trial court had made a finding that the "boat had recently sailed from Mexican waters", the Circuit Court of Appeals in affirming the conviction stated in a footnote:

> "1. We do not mean to imply that a finding by the trial court that the boat actually

crossed the border is always necessary, however." supra at page 1372.

While there is insufficient evidence in the case *sub judice* for a finding that the "Business Stinks" actually crossed the border, there, nevertheless, are sufficient articulable f cts (as stated above) to find that the Customs Patrol Officer had reasonable suspicion that the vessel had come from either a foreign port or from contact with a foreign vessel to justify a boarding of the vessel under 19 U.S.C. Section 1581(a) which provides:

> "Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under sections 1701 and 1703-1711 of this title, or any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

As the Court stated in *United States v. Tilton,* (9th Cir. 1976) 534 F.2d 1363,:

> "[2] We hold that a search without probable cause pursuant to 19 U.S.C. §1581(a) of a vessel in a harbor may be valid under the Fourth Amendment as a border search at the

> functional equivalent of the border, not only where, as in *Solmes,* there is evidence to support a finding that the boat actually came from international or foreign waters, but also where there are articulable facts to support a reasonably certain conclusion by the customs officers that a vessel has crossed the border and entered our territorial waters. Thus, this latter rule looks not to whether the vessel actually crossed into United States territory, but whether the searching customs officers were reasonably certain that it did." at P 1366.

See also *United States v. Hill,* (fth Cir. 1970) 430 F.2d 129.

The undersigned concludes as a matter of Law that C.P.O. Settles had reasonable suspicion to stop the vessel "Business Stinks" and thereupon to search it.

RECOMMENDATION

Accordingly, it is the recommendation of the undersigned that the Motion to Suppress be DENIED.

DATED at Miami, Florida, this 13 day of APRIL, 1978.

/s/ Herbert S. Shapiro
HERBERT S. SHAPIRO
UNITED STATES
MAGISTRATE

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UNITED STATES of America,
Plaintiff-Appellee,

v.

John Norman KLEINSCHMIDT and
Michael Andrew Sorrentino,
Defendants-Appellants.

No. 78-5427

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit

June 4, 1979.

Defendants were convicted in the United States District Court for the Southern District of Florida at Miami, after Sidney M. Aronovitz, J., refused a motion to suppress marijuana found aboard a vessel. Defendants appealed. The Court of Appeals held that: (1) customs officials have power under statute to stop and board vessels in customs waters for routine documents check even in absence of a modicum of suspicion, and (2) testimony of witnesses is sufficient to establish identity of controlled substance beyond reasonable doubt, and where defendants stipulated to content of such

*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

testimony, had it been given, such stipulation was binding and provided sufficient evidence for court to conclude that substance in possession of defendants was marijuana.

Affirmed.

1. Customs Duties — 126

Customs officials have power under statute to stop and board vessels in customs waters for routine documents check even in absence of modicum of suspicion. 18 U.S.C.A. §2; Tariff Act of 1930, §581, 19 U.S.C.A. §1581; U.S.C.A. Const. Amend. 4; Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. §841(a)(1).

2. Customs Duties — 126

Where customs officer was notified that vessel had been observed which was apparently capable of traveling to and from foreign waters and was not seen to have left port that evening and where it was then found that cabin area was dark and front windshield of vessel was covered with canvas and vessel appeared to be heavily loaded and was found to be on list of suspect vessels, there was reasonable suspicion which, had it been necessary, would have justified stopping and boarding vessel in customs waters. 18 U.S.C.A. §1581; Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. §841(a)(1); U.S.C.A.Const. Amend. 4

3. Customs Duties — 126

Once customs agents were properly on board vessel, further search could be constitutionally validated only by existence of probable cause plus exigent circumstances, but odor of marijuana, to which both customs officers testified, provided probable cause for search, and exigency was created by inherent mobility of vessel, limited visibility and possibility that two men were not alone on vessel or might have secret arms aboard, and suppression was thus properly denied. U.S.C.A.Const. Amend. 4; 18 U.S.C.A. §2; Tariff Act of 1930, §581, 19 U.S.C.A. §1581; Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. §841(a)(1).

4. Drugs and Narcotics — 123

Testimony of witnesses is sufficient to establish identity of controlled substance beyond reasonable doubt, and where defendants stipulated to content of such testimony, had it been given, such stipulation was binding and provided sufficient evidence for court to conclude that substance in possession of defendants was marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970. §401(a)(1), 21 U.S.C.A. §841(a)(1); 18 U.S.C.A. §2.

5. Criminal Law — 566

Where procedure during trial left no doubt that individuals identified by officer were those aboard vessel on which marijuana was found, nothing more was required for identification, and it was not necessary that identification be made by name rather than description.

Appeals from the United States District Court for the Southern District of Florida.

Before COLEMAN, FAY and RUBIN, Circuit Judges.

PER CURIAM:

In another of the flotilla of cases challenging the actions of customs officials in stopping and searching a vessel off the coast of the United States, the appellants claim that the evidence secured by a search of their ship, BUSINESS STINKS, was obtained in violation of their Fourth Amendment rights and should have been excluded. They also allege that the government adduced insufficient evidence to demonstrate that the substance discovered was marijuana. Appellant Sorrentino claims in addition that his identity was never established during trial. Finding none of these contentions worthy of safe harbor, we affirm.

The vessel BUSINESS STINKS was first sighted approximately one mile off-shore by a customs officer watching the coastal waters from a naval observation tower at 11:30 p.m. December 30, 1977. The officer notified customs officers patrolling the waters that he had observed a vessel apparently capable of traveling to and from foreign waters not seen to have left port that evening.

Acting on this information, a customs patrol located the vessel and approached her. Customs Patrol Officer Settles testified that he noticed that the vessel was wallowing, as if she bore a heavy load, and that the waterline mark nevertheless appeared normal,

suggesting to him that the ship had a false waterline. The cabin area was completely dark and the front windshield of the vessel was covered with canvas. Two men were on the bridge.

As the vessel passed the customs ship, Settles saw its name. BUSINESS STINKS was on a list of suspect vessels given Settles two weeks earlier by his supervisor who had obtained the information from the Fort Lauderdale Police Department.

As a result of their suspicions, the customs agents turned on their blue light and stopped the BUSINESS STINKS. The men on board refused to identify themselves or provide registration papers. Two customs officers therefore boarded the vessel. While Settles proceeded to the bridge to check for registration, Officer Collins went to the cabin. He smelled the odor of marijuana and, upon opening the cabin door, discovered a large number of bales. Settles testified that he also smelled marijuana from his position on the way to the bridge.

Kleinschmidt and Sorrentino, the men on the bridge, were arrested for possession of marijuana with intent to distribute, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. At the bench trial Settles was the sole witness for the government. He identified both appellants to the court by their descriptions, although not by name. No chemist appeared; prior to trial defense counsel and the government stipulated that the chemist's testimony would be that the suspect bales found on board the vessel were marijuana. Both defendants were convicted after the court rejected their motion to suppress.

I. The Motion to Suppress

The magistrate's report, adopted by the district court, approved the actions of the customs agents either as a border search — premised on reasonable suspicion arising from articulable facts that the BUSINESS STINKS had just crossed the border or had had contact with a foreign vessel — or as an investigatory stop under the standards of *United States v. Brignoni-Ponce,* 1975, 422 U.S. 873, 884, 95 S.Ct. 2574, 2582, 45 L.Ed.2d 607. Although we cannot agree that, as a matter of law, the customs officials had reason to believe the vessel had a sufficient nexus with the border to justify a border search, we do conclude that there was statutory and constitutional authority for their actions, and the motion to suppress was properly denied.

[1, 2] Customs officials have the power under 19 U.S.C. §1581(a) to stop and board vessels in customs waters for a routine documents check even in the absence of a modicum of suspicion. *United States v. Freeman,* 5 Cir. 1978, 579 F.2d 942, 945; *United States v. Whitaker,* 5 Cir. 1979, 592 F.2d 826 (1979). Even if we were to apply to blue water the standards of *Brignoni-Ponce* and *Delaware v. Prouse,* 1979, ____ U.S. ____, ____, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660, requiring reasonable suspicion of wrongdoing before automobiles may be subjected to a minimally intrusive investigatory stop, *see United States v. Williams,* 5 Cir. 1979, 589 F.2d 210; *United States v. Williams,* 5 Cir. 1977, 544 F.2d 807, 811, such reasonable suspicion was present in this case.

The vessel approached the coast late at night, and had not been seen leaving port earlier. It was of a type

capable of foreign travel. The customs officials noted that the vessel was wallowing, as if it were heavily loaded, but that the waterline appeared high, suggesting that it had been altered. The cabin was dark, and the windshield covered by canvas. The name of the vessel was on a list of suspect ships furnished customs authorities by the Fort Lauderdale police department. The occupants of the ship refused to respond to questioning when customs officers approached. All these circumstances combined to provide reasonable suspicion of wrongdoing sufficient to justify an investigatory stop and boarding.

[3] Once on board, a further search could be constitutionally validated only by the existence of probable cause plus exigent circumstances. *See, e.g., United States v. Cadena,* 5 Cir. 1979, 588 F.2d 100; *United States v. Cortes,* 5 Cir. 1979, 588 F.2d 106, 110; *United States v. Weinrich,* 5 Cir. 1978, 586 F.2d 481, 492-94; *United States v. Freeman, supra.* The odor of marijuana, to which both customs officers testified, provided probable cause for the search. *United States v. Villarreal,* 5 Cir. 1978, 565 F.2d 932, 937. Exigency was created by the inherent mobility of the vessel and the possibility it might escape the single customs vessel detaining it, the limited visibility at the time, and the possibility that the two men were not alone on the vessel or that they might have secret arms aboard, causing danger to the customs agents if the ship were not immediately secured. The trial court, therefore, properly denied the motion to suppress.

II. Nature of the Substance Found

Although the appellants stipulated at trial that the chemist need not be brought to testify, and "if the chemist were called that he would testify that [the substance found on board] is marijuana," they now contend the evidence was insufficient to prove that marijuana was present.

[4] The testimony of witnesses is sufficient to establish the identity of a controlled substance beyond a reasonable doubt. *United States v. Crisp,* 5 Cir. 1977, 563 F.2d 1242, 1244; *United States v. Park,* 5 Cir. 1976, 531 F.2d 754, 763. Appellants have stipulated to the content of that testimony, had it been given. Such a stipulation is binding, *United States v. Cadena,* 5 Cir. 1978, 585 F.2d 1252, 1264; *United States v. Cantu,* 5 Cir. 1975, 510 F.2d 1003, 1004, and it provided sufficient evidence for the court to conclude that the substance was marijuana.

United States v. Hellman, 5 Cir. 1977, 560 F.2d 1235 is not to the contrary. We there held that such a stipulation does not eliminate the requirement that a jury be instructed on the essential elements of the offense charged. The case should not be read to imply that stipulations cannot themselves provide sufficient evidence to satisfy those elements. This attack on appellants' convictions is frivolous.

III. Identification of Sorrentino.

[5] Both appellants were identified by customs officer Settles by description during the bench trial. Moreover, Sorrentino had been identified by name dur-

ing the suppression hearing. The trial judge was clearly satisfied that a proper identification had been made for he immediately thereafter adjudged the two defendants guilty by name.

No authority has been cited for the proposition put forward by Sorrentino that identifications must be made by name rather than description. The proposition is patently unsound; it is not essential to conviction that the law violator's true name be known. The procedure followed during trial left no doubt that the individuals identified by Officer Settles were those aboard the BUSINESS STINKS. Under these circumstances, we cannot hold that more was required.

The convictions are AFFIRMED.

United States Court of Appeals
FIFTH CIRCUIT

OFFICE OF THE CLERK

July 13, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5427 —

U.S.A.

v.

JOHN NORMAN KLEINSCHMIDT and
MICHAEL ANDREW SORRENTINO

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

By /s/ Sally Hayward
Deputy Clerk

cc: Mr. William L. Rogers
Mr. Steadman S. Stahl, Jr.
Mr. Caridad P. Matthews

§1581. Boarding vessels

(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act [19 USCS §§70, 1401 et seq., 1581 et seq., 1701 et seq.; 46 USCS §§60 et seq., 277 et seq.], or at any other authorized place without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

Supreme Court, U. S.
FILED
OCT 6 1979
MICHAEL RODAK, JR., CLERK

No. 79-230

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN KLEINSCHMIDT and MICHAEL SORRENTINO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

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JOHN KLEINSCHMIDT and MICHAEL SORRENTINO,
PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the search of their vessel and the seizure of marijuana from it violated their Fourth Amendment rights.

1. Following a jury-waived trial in the United States District Court for the Southern District of Florida, petitioners were convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner Kleinschmidt was sentenced to three years' imprisonment to be followed by a special parole term of two years. Petitioner Sorrentino was sentenced to four years' imprisonment to be followed by a special parole term of two years. The court of appeals affirmed per curiam (Pet. App. 9-17).

On the evening of December 30, 1977, United States Customs Patrol Officer Settles was in command of a customs patrol vessel in Port Everglades Cut, Fort Lauderdale, Florida (Tr. 6-7).[1] At 11:30 p.m., a customs officer on duty in a naval observation tower ashore radioed the customs vessel that a boat entering Port Everglades Cut "looked good," that it had not been seen going out that night, and that it was large enough to be capable of foreign travel (Tr. 6-8, 20). Acting in response to this message, Officer Settles approached the unknown vessel and saw that it was wallowing as if carrying a heavy cargo (Tr. 9, 35, 38, 45, 62), but that the waterline mark was too high for a heavy load (Tr. 9-10, 37, 39-40, 47). Officer Settles also observed that the cabin area of the boat was dark, that canvas covered its front windshield, and that two individuals were standing on the flying bridge (Tr. 9).

As Officer Settles watched the boat, it turned from west to north, heading toward a dock (Tr. 32-34, 45). The officer pursued the boat and saw that its name was "Business Stinks" (Tr. 10, 40). Officer Settles ascertained that the "Business Stinks" had previously been identified by the Fort Lauderdale Police Department as suspected of carrying contraband (Tr. 11-13, 25). At this point, Officer Settles called to the boat, identified himself, and asked the boat's origin and whether there were registration papers on board. The individuals on the vessel did not respond to these inquiries (Tr. 13-14, 41).

Officer Settles, accompanied by Customs Patrol Officer Collins, then boarded the "Business Stinks." As Officer Settles proceeded to the bridge to check the boat's registration papers, he smelled what he believed to be

[1]"Tr." refers to the transcript of the April 6, 1978 suppression hearing.

marijuana (Tr. 14-15; Pet. App. 13). Officer Collins, while approaching the cabin to determine whether anyone else was on board, also smelled marijuana. He then opened the cabin door and discovered a large number of bales of marijuana (Tr. 14-15, 74, 84). At that point, petitioners were arrested (Tr. 14).

In denying petitioners' motion to suppress the evidence seized as a result of the search of the cabin, the district court, upholding the finding of a magistrate, justified the customs officers' actions as a border search (Pet. App. 1-7) or alternatively as the legitimate fruit of an investigatory stop (*id.* at 14). The court of appeals rejected the border search rationale but held that the officers were lawfully on board the vessel pursuant to an investigatory stop and that probable cause and exigent circumstances justified the search of the cabin (*id.* at 14-15).

2. Petitioners' contention (Pet. 9) that the customs officers' search of their vessel and seizure of the marijuana violated their Fourth Amendment rights is insubstantial.

Although the court of appeals stated (Pet. App. 14) that customs officers have authority under 19 U.S.C. 1581(a) to stop and board vessels in customs waters without suspicion of illicit activity, it did not rest its decision on that ground.[2] Instead, the court below found that the

[2]There is thus no occasion to consider petitioners' claim (Pet. 8) that the Ninth Circuit has accorded citizens a greater "expectation of privacy" in customs waters than the Fifth Circuit has. In any event, the cases cited by petitioners are of no help to them. *United States* v. *Solmes*, 527 F. 2d 1370 (9th Cir. 1975), and *United States* v. *Stanley*, 545 F. 2d 661 (9th Cir. 1976), upheld the searches as having taken place at the functional equivalent of the Mexican border, thus dispensing with the need for probable cause (see *United States* v. *Ramsey*, 431 U.S. 606, 616-619 (1977)). *United States* v. *Tilton*, 534 F. 2d 1363 (9th Cir. 1976) remanded the case to the district court for further findings on the border issue; it did not address the question whether, if the search had not taken place at the border, reasonable suspicion or probable cause would have been required in order to search.

totality of the circumstances "provide[d] reasonable suspicion of wrongdoing sufficient to justify an investigatory stop and boarding" of petitioners' vessel (Pet. App. 15). Once the officers were legally aboard, the odor of marijuana provided probable cause to search the vessel further, and the vessel's inherent mobility, in addition to other factors noted by the court of appeals, provided the exigent circumstances justifying the absence of a search warrant (*ibid.*).

The court of appeals' application of settled principles to the particular facts of this case is correct, and further review is unwarranted. Petitioners concede that customs officers have a statutory right to board vessels in customs waters (Pet. 9), that the officers here were acting pursuant to that authority (*ibid.*), and that Officer Settles' actions in proceeding to the bridge to question the crew were proper (Pet. 11). Petitioners' quarrel is with the actions of Officer Collins, who, they assert, "searched the cabin * * * merely because he had boarded the vessel" (Pet. 15). But Officer Collins, no less than Officer Settles, was lawfully aboard petitioners' boat, and the court of appeals found that he smelled marijuana before he opened the cabin door (Pet. App. 13). Petitioners do not dispute, nor could they, that the smell of marijuana in these circumstances provided probable cause for further search. See, *e.g.*, *United States* v. *Holbrook*, 571 F. 2d 335 (5th Cir. 1978).

In any event, the evidence shows that Officer Settles also smelled marijuana as he was proceeding to the bridge (Pet. App. 13).[3] Since petitioners have conceded that

[3]Petitioners argue (Pet. 11 n.1) that the evidence shows that Officer Settles did not smell marijuana until after Officer Collins had opened the cabin door, but the court of appeals was unpersuaded (Pet. App. 13).

Officer Settles was acting lawfully, and since they do not dispute that the smell of marijuana furnishes probable cause to search in these circumstances, their claim on this record reduces to an assertion that Officer Settles, not Officer Collins, should have conducted the search. This is not a substantial question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979